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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE ex rel. CITY OF LOS ANGELES, Plaintiffs and Respondents, v. DINO'S VICTORY ROADHOUSE, INC., et al., Defendants and Appellants,	B202083 (Los Angeles County Super. Ct. No. BC353242)
DINO'S VICTORY ROADHOUSE, INC., et al., Cross-complainants and Appellants, v. CITY OF LOS ANGELES, Cross-defendant and Respondent.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Malcolm H. Mackey, Judge. Affirmed.

Larry G. Noe, for Defendants, Cross-complainants and Appellants.

Rockard J. Delgadillo, City Attorney; Asha S. Greenberg and Jonathan Galatzan, Deputy City Attorneys, for Plaintiffs and Respondents People of the State of California and City of Los Angeles.

Rockard J. Delgadillo, City Attorney, Jeri Burge and Steven N. Blau, Deputy City Attorneys, for Cross-defendant and Respondent City of Los Angeles.

This case arose from a zoning dispute -- whether a distance of "500 feet" prescribed in a local zoning ordinance means "500 feet measured along a line which may be walked between two points," or "500 feet measured along a straight line between two points, without regard to any intervening structures." The trial court interpreted "500 feet" to mean "500 feet measured along a straight line," applied this interpretation to a set of undisputed facts, and found that a so-called "adult cabaret" was operating within less than 500 feet from the nearest residential lot in violation of the Los Angeles Municipal Code. The court entered a final judgment which enjoined the cabaret from continuing its operations, and imposed joint and several liability for statutory penalties against the cabaret's corporate owner and the corporation's chief executive officer. Appellant does not attack the trial court's interpretation of how the 500 feet is measured. Instead, he argues the trial court failed to consider his constitutional challenges to the ordinance, and that the statutory penalties improperly imposed for a number of reasons.

We affirm the judgment.

BACKGROUND AND FACTS

The Zoning Ordinances

Since 1978, the subject of "Adult Entertainment Zoning" within the City of Los Angeles has been regulated under section 12.70 of the Los Angeles Municipal Code.[1] The original language of section 12.70C provided: "No person shall cause or permit the

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[1] All section references are to the Los Angeles Municipal Code except as noted.

establishment, substantial enlargement or transfer of ownership or control of an adult entertainment business within . . . 500 feet of a religious institution, school, or public park . . . ." At the same time, section 12.70D provided: " . . . The distance between any adult entertainment business and any religious institution, school or public park shall be measured in a straight line, without regard to intervening structures, from the closest exterior structural wall of the adult entertainment business to the closest property line of the religious institution, school or public park."

Effective in 1984, the City amended section 12.70C to include this additional provision: "No person shall cause or permit the establishment, or substantial enlargement of an adult entertainment business within 500 feet of any lot in [a residential] zone . . . ." In more colloquial verbiage, the City amended section 12.70C to add residential property to the list of sites to which its proximity restriction for the establishment of an adult entertainment business applied.

The City's amendment of section 12.70C in 1984 to include residential property was not accompanied by any language amending section 12.70D. In other words, at all times after 1984, section 12.70D continued to set forth a "straight line" methodology for measuring the distance between a proposed adult entertainment business and a religious institution, school or public park, but the section did not expressly state that this same methodology also applied for measuring the distance between an adult entertainment business and the nearest residential lot.

Effective in 1986, the City amended section 12.70C once again. The 1986 amendment to section 12.70C appears to have been designed to address the subject of existing adult entertainment businesses, whereas the earlier versions of the subdivision addressed the establishment or transfer of ownership of such businesses. Under the 1986 amendment to section 12.70C (which remains in effect today) "no person shall cause or permit the continued operation . . . of a lot, building or structure . . . as an . . . Adult

Cabaret . . . within 500 feet of any lot in [a residential] zone . . . ."[2] At the same ordinance, the City amended section 12.70E4 to provide that "[a]n adult entertainment business may be continued, or established and maintained, pursuant to Section 12.22A20."

Under section 12.22A20, the City may grant an adult entertainment business an exception from the proximity restrictions prescribed by section 12.70C upon showing that an alternate site for the business is not reasonably available elsewhere in the City.

The Frisky Kitty

During the 1990s, Dino's Victory Roadhouse, Inc. (hereafter Dinos) owned and operated a business known as "The Frisky Kitty" in a building located near the southeast corner of Oxnard Street and Reseda Boulevard in Tarzana. The entrance to The Frisky Kitty fronted on, and was accessed from, Oxnard Street. The property located behind The Frisky Kitty was zoned for residential use, and appears to front on another roadway (Hatteras Street) which runs parallel to Oxnard Street. The distance between The Frisky Kitty and the residential property – measured by walking west on Oxnard Street and then south on Reseda Boulevard – is more than 500 feet. The distance between The Frisky Kitty and the residential property – measured in a straight line from its exterior wall to the property line of the residential property – is less than 500 feet.

Until 1998, Dinos operated The Frisky Kitty as a bar at which bikini-clad dancers provided entertainment. In 1998, dancers at The Frisky Kitty began exposing their breasts, thus causing the business to become an "adult cabaret" by definition.[3] Although

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[2] Section 12.70B3 defines an adult cabaret as a nightclub, bar, or similar establishment "which regularly features live performances . . . characterized by the exposure of 'specified anatomical areas' . . . ." Section 12.70B13 defines such "specified anatomical areas." We need not articulate the listed anatomical areas; there is no dispute in this case that "The Frisky Kitty" operated an adult cabaret as defined under the municipal code.

[3] The real property upon which The Frisky Kitty bar building is located is owned by parties who are not involved in the current appeal.

the date is not altogether clear, it appears that Dinos stopped selling alcoholic beverages at about the same time that it started operating as an adult cabaret.

Prior Litigation

In September 1998, City officials entered The Frisky Kitty, observed bare-breasted dancers, and issued a citation which ordered Dinos to cease its operations in violation of section 12.70C.

In December 1998, Dinos filed an action in local federal district court to enjoin the City from enforcing section 12.70C. (*Dino's Victory Road House, Inc. v. City of Los Angeles* (C.D.Cal. Dec. 7, 1998, Civ. No. 98-9812-RSWL) (*Dinos I*).) Dinos's federal court complaint alleged a violation of its United States Constitution First Amendment right to present topless dancing and a violation of its constitutional right to due process. Dinos's due process claim was based on its allegation that section 12.70C was unconstitutionally "vague" because it failed to specify the method for measuring "500 feet" between an adult cabaret and the nearest residential property. In March 1999, Dinos filed a request to dismiss its federal court action without prejudice, explaining that it "intend[ed] to seek a [zoning] variance and/or an exception provided by the Los Angeles Municipal Code."[4]

In May 1999, Dinos filed an application with the City seeking a variance and/or exception to section 12.70C on the ground that there was no reasonably available site to which it could relocate its business. (See fn. 4, *ante*.) In the latter half of 1999, a zoning administrator (ZA) denied Dinos's application for a variance, the City Council denied Dinos's appeal of the ZA's decision, and Dinos filed a petition for writ of administrative mandamus challenging the City's zoning decision. In January 2000, the trial court ruled that the City had failed to make adequate findings to support its decision, granted Dinos's writ petition, and entered a judgment directing the City to grant the variance for which

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4 As noted above, the City may grant an adult entertainment business an exception from the restrictions prescribed by section 12.70C upon showing that an alternate site for the business is not reasonably available elsewhere in the City. (§ 12.22A20.)

Dinos had applied. In 2001, Division Two of our court reversed the judgment, ruling that the appropriate remedy for the City's failure to issue adequate findings was to return Dinos's application for a zoning variance for "proper consideration at the administrative level." (*Dino's Victory Road House, Inc. v. City of Los Angeles* (May 23, 2001, B139836) [nonpub. opn.] (*Dinos II*).)

More Prior Litigation

Following *Dinos II*, a ZA again denied Dinos's application for a zoning variance, the City Council again denied Dinos's request for a different decision, and Dinos again filed a petition for writ of administrative mandamus. In June 2003, the trial court ruled that Dinos had been granted inadequate notice to prepare for the City Council hearing, and remanded the matter for further proceedings. In October 2003, following additional administrative proceedings, the City again denied Dinos's application for a zoning variance. In December 2003, the trial court entered a judgment denying Dinos's second petition for a writ of administrative mandamus. In late 2005, Division One of our court affirmed the trial court's judgment, ruling that substantial evidence supported the City's conclusion that a site was "reasonably available" for relocation of Dinos's business within the meaning of section 12.22A20. (*Dino's Victory Roadhouse, Inc. v. City of Los Angeles* (Nov. 8, 2005, B176576) [nonpub. opn.] (*Dinos III*).) In February 2006, the California Supreme Court denied Dinos's petition for review.

The Current Litigation

That brings us to the current action. Throughout the events summarized above, Dinos continued to operate The Frisky Kitty as an adult cabaret.[5] In June 2006, shortly after it prevailed in *Dinos III*, the City filed a complaint to enjoin Dinos from continuing to operate The Frisky Kitty.[6] In August 2006, the City filed its operative first amended complaint.

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5 In January 2005, the Board of Police Commissioners issued a permit to Dinos to operate The Frisky Kitty as an adult club.

6 Our references to the City include the People of the State of California.

The City's complaint alleged three causes of action in support of injunctive relief: (1) violation of the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq.) based on Dinos's underlying violation of section 12.70C; (2) public nuisance based on Dinos's violation of section 12.70C; and (3) public nuisance based on Dinos's violation of section 91.103.3 in that Dinos's failed to obey the City's order to cease its operations in violation of section 12.70C. In addition to its prayer for injunctive relief, the City also prayed for statutory penalties under the UCL against Dinos and its chief executive officer, Jamal Haddad, based upon each day that Dinos had continued in operation after receiving the City's order to cease its operations.

Dinos answered the City's complaint, and filed a cross-complaint alleging a single cause of action for violation of its civil rights. More specifically, Dinos alleged the City had violated the corporation's United States Constitution First Amendment right "to present strip tease and erotic dancing," and its Fourteenth Amendment right to due process. The latter claim rested on Dinos's claim that City was attempting to enforce an unconstitutionally vague ordinance (§ 12.70C) which did not specify the measurement method to be utilized in determining the distance between Dinos's adult cabaret and the nearest residential lot. In December 2006, the trial court sustained the City's demurrer to Dinos's cross-complaint without leave to amend on the ground that Division One of our court had addressed and rejected Dinos's constitutional claims in *Dinos III*.

In February 2007, the City filed a motion for summary judgment or, alternatively, summary adjudication of issues on its complaint. On May 18, 2007, the trial court issued a statement of decision in which it granted the City's motion for summary adjudication of three issues: (1) Dinos was operating The Frisky Kitty in violation of section 12.70C; (2) Dinos violated section 91.103.3 by failing to comply with the City's order to discontinue operating The Frisky Kitty; and (3) Dinos violated the UCL (Bus. & Prof. Code, § 17200 et seq.) by its underlying violations of sections 12.70C and 91.103.3.

In May 2007, the City filed a memorandum of points and authorities in support of the imposition of civil penalties under the UCL. On June 19, 2007, the trial court "held trial regarding . . . the amount of penalties" under the UCL, following which it imposed penalties in the amount of $90,000. On July 10, 2007, the trial court entered a judgment and permanent injunction, including a provision which imposes $90,000 in civil penalties under the UCL, payable jointly and severally by Dinos and Haddad.

Dinos and Haddad filed a timely notice of appeal.

DISCUSSION

I.

In a series of interrelated "points," Dinos contends the judgment must be reversed because the trial court either "refused to consider" and/or erroneously rejected Dinos's constitutional challenges to section 12.70C. We summarily reject all of Dinos's attacks on the judgment on constitutional grounds because it has failed to cite any legal authority in support of any of its constitutional arguments. (See, e.g., *In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164 [if legal argument is not supported by citation of legal authority, a reviewing court may pass it without consideration].)

II.

In a series of interrelated "points," Dinos contends the judgment must be reversed because the statutory penalties imposed against it under the UCL ($90,000) are excessive. We summarily reject all of Dinos's attacks on the amount of the statutory penalties under the UCL because Dinos has not cited any legal authority in support of its arguments.

III.

In a series of interrelated "points," Jamal Haddad contends the judgment must be reversed insofar as provides that he is jointly and severally liable for the $90,000 in statutory penalties imposed under the UCL. More specifically, Haddad contends the provision in the judgment making him jointly and severally liable for the statutory penalties must be reversed because the evidence is not sufficient to show that he is Dinos's "alter ego," or that he, individually, violated the UCL. The respondent's brief filed by the City argues that he "may not raise a fact based legal theory . . . for the first

time on appeal." The City also contends that Haddad was properly held responsible for the fines because he personally participated in the unlawful practices, as was found appropriate in *People v. Toomey* (1984) 157 Cal.App.3d 1, 14 (*Toomey*).

Though we believe the Haddad may raise this point on appeal, we disagree with his conclusion that the evidence in the record before us does not support the imposition of individual liability. The penalties were properly imposed.

A.

The City's argument that Haddad cannot raise a new "fact based" issue on appeal is not correct. Haddad is not raising a new issue which requires any resolution of factual matters; he is arguing that the evidence presented in the trial court does not support the judgment making him liable for penalties under the UCL. A contention that a judgment is not supported by substantial evidence is an "obvious exception" to the general rule that points not raised in the trial court cannot be raised for the first time on appeal. (*Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17.) The City is simply wrong that a party cannot object on appeal that he or she has been held liable for something that he or has not been shown to have done.

B.

On the other hand, Haddad is incorrect in asserting that alter ego liability is yardstick by which to measure whether he can be held liable for the fines under the UCL. In fact, no California appellate decision has applied alter ego principles to this section. Case law provides that "[t]he concept of vicarious liability has no application to actions brought under the unfair business practices act." (*Toomey, supra*, 157 Cal.App.3d at p. 14; see also *Emery v. Visa Internat. Service Assn.* (2002) 95 Cal.App.4th 952, 960.) In order to impose liability on a corporate officer within this context, it must be based on "his personal participation in the unlawful practices." (*Toomey*, at p. 14.)

In *Toomey*, the defendant sold discount coupons for use at casinos in Reno which, when tendered, turned out to be problematic in a number of ways. Toomey contended he could not be held liable under the UCL for the acts of his employees, who actually sold the coupons. The First District determined that because he was the president and operating officer of the business selling the coupons, who orchestrated the business with "unbridled control over the practices which were found violative of section 17200 and 17500[], [h]is position in the corporation and operation of the business subject[ed] him to liability for misleading solicitations made by his employees. [Citation.]" (*Toomey*, *supra*, 157 Cal.App.3d at p. 15.) The facts supporting imposition of liability were as follows: "[h]e shared coupons with the distributors," discussed the content of the solicitations to be used, took complaints from distributors and determined the appropriate response; collected sale receipts from the distributors, and endorsed checks to facilitate the transactions. In sum, Toomey was "the moving force behind the entire coupon sales program and a joint participant with the other distributors in their business operations." (*Id*. at p. 16.)

The *Toomey* court cited with approval earlier authority, *People v. E.W.A.P., Inc*. (1980) 106 Cal.App.3d 315, 322, which requires that for imposition of civil penalties under the UCL, the People also have to prove scienter, or a knowing violation of the statute. (*Toomey*, *supra*, 157 Cal.App.3d at pp. 14-15.)

Here, Haddad testified and said he is half owner of the stock of the Frisky Kitty and its CEO. In addition, he admitted to managing the club and assigning the work of the door man, manager, and bartender. In addition, there can be little doubt Haddad knew that the he was participating in acts which caused Dinos's continuing violation of the zoning statutes given the history of the litigation process

C.

We agree with the City that the evidence established the facts required for imposition of personal liability. For the reasons stated above, we disagree with Haddad that the evidence is insufficient to support the imposition of individual liability under the UCL based on his individual activities.

IV.

In an isolated "point," Dinos seems to suggest that the judgment must be reversed to the extent it imposes *any* statutory penalties against it under the UCL. This is Dinos's complete argument: "There was unrefuted testimony at the trial that [Dino's] was operating under a police permit and as such it would be inequitable to hold [it] financially liable for so operating." (Fn. omitted.) We believe that the insufficiency of this argument is self-evident insofar as a showing of reversible error is concerned. Absent development of this argument, we summarily reject Dinos's implicit assertion that the element of a police permit, standing alone, must invalidate the UCL penalties as a matter of law.

DISPOSITION

The judgment is affirmed. Each party to bear their own costs of appeal.

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BIGELOW, J.

We concur:

COOPER, P. J.

RUBIN, J.